85-1193

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOHN S. MAGEE, Individually and
t/a COLLEGIATE RESEARCH SYSTEMS,

Petitioner,

vs.

HAROLD J. RUVOLDT, Prosecutor
of Hudson County,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW

A. Whether N.J.S. §2A:170-77.16 is unconstitutionally vague, overly broad, and invalid.

B. Whether Petitioner's rights to equal protection of the laws and due process, as guaranteed by the United States Constitution, have been violated by Respondent's selective enforcement of the law and by his prosecutorial conduct.

C. Whether Petitioner's right to due process of law was violated by an adjudication that Petitioner had acted in contempt of a prior restraint, which adjudication was based on insufficient evidence.

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Pursuant to Rule 28.4(c), this shall constitute a recitation that 28 U.S.C. Section 2403(b) may be applicable.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOHN S. MAGEE, Individually and
t/a COLLEGIATE RESEARCH SYSTEMS,

Petitioner,

vs.

HAROLD J. RUVOLDT, Prosecutor
of Hudson County,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF NEW JERSEY

John S. Magee, individually and trading as Collegiate Research Systems, hereby respectfully petitions for a writ of certiorari to review a Judgment of the Supreme Court of New Jersey.

STATUTES INVOLVED

N.J.S. §2A:170-77.16 provides:

> No person shall, for any fee, or other remuneration, prepare, offer to prepare, cause to be prepared, sell or offer for sale any term paper, thesis, dissertation, essay, report or other written, recorded, pictorial, artistic or other assignment knowing, or under the circumstances having reason to know, that said assignment is intended for submission either in whole or substantial part under a student's name in fulfillment of the requirements for a degree, diploma, certificate, course or courses of study at any university, college, academy, school, or other educational institution.

STATEMENT OF THE CASE

The defendant, John S. Magee, trading as Collegiate Research Systems, (herein "Petitioner"), is a resident of New Jersey engaging in the business of providing written research material to customers. The plaintiff, Harold J. Ruvoldt (herein "Respondent") is the Prosecutor of the County of Hudson, State of New Jersey.

In 1977 the New Jersey State Legislature

enacted N.J.S. 2A:170-77.16 (herein: "the statute"), which is quoted in full above. In summary, the statute penalizes those who provide research materials if the provider knows, or has reason to know, that the recipient intends to submit the material to an educational institution for academic credit.

Since 1973, Petitioner has been engaged in the business of preparing and selling research materials. Petitioner employs a staff of authors which prepares papers to order; he maintains an extensive collection of research articles. Petitioner's customers include individuals and corporations engaged in private enterprise, governmental officials, public interest groups, and academia. For a fee, the Petitioner produces a paper addressing virtually any subject, at a level of sophistication and intensity as required by the customer. Petitioner's business is virtually identical to nationally recognized research services, such as the

Encyclopedia Britannica Research Service, The Collier Encyclopedia Reference Service, and others.

After the statute was adopted, Petitioner required each customer to sign a statement disclaiming any intent to use the material for a prohibited purpose. Furthermore, the Petitioner posted a sign at his place of business, providing as follows:

> "Collegiate Research Systems operates as a Publisher and distributor of educational source material. The material we provide is intended to provide the reader with background and source material on a given topic. All appropriate State Laws and University Rules and Regulations regarding the proper use of research materials should be strictly adhered to."

Petitioner was involved with no legal proceedings brought under the statute until March, 1983, when Respondent caused two investigators to order and purchase research papers from Petitioner. Both investigators, full time employees of the Hudson County Prosecutor's office, were equipped with hidden

recording devices; neither was a student intending to use the research paper for credit; neither identified himself as a student; neither represented that he intended to submit the research material for educational credit.

The first investigator concluded that the research paper which he received was insufficient to justify educational credit without substantial modification. The second investigator, following his review of his material, concluded that the materials received did not constitute a violation of the statute, in and of themselves, but that Petitioner's use of a particular order form reflected Petitioner's knowing violation.

Based upon these investigations, the Respondent, on April 13, 1983, filed a Verified Complaint in the Superior Court of New Jersey, alleging that Petitioner had sold research papers with reason to know that the purchasers intended to submit those papers to

an educational institution for academic credit. On May 4, 1983, an interim restraint was entered, enjoining Petitioner from violating the statute.

Thereafter, Respondent caused another investigator employed by his office to order research materials from the Petitioner in an attempt to demonstrate a violation of the interim restraint of May, 1983. During November, 1983, the investigator communicated with Petitioner to obtain research materials. This third investigator did not identify himself as a student; was not a student; specifically identified himself as a writer attempting to do an original research paper on heroin; did not refer to the research paper as a term paper; did not use the word "assignment". The investigator was equipped with a hidden recording device. In January, 1984, this investigator testified that he did not feel that the research materials received were of sufficient elucidation or sophis-

tication to be submitted for educational credit; he considered the paper to be only a starting point. At that hearing, Petitioner presented expert testimony that the material provided this third investigator was only a capsule piece of research in outline form, similar in concept to subject outlines available at book stores.

Petitioner was found to have violated the interim restraint of May, 1983, and was adjudicated in contempt of that restraint and sentenced to serve 5 days in the Hudson County Jail and to pay a $500.00 fine. This sentence was stayed pending Petitioner's State appeals; the custodial sentence has now been served and the fine now paid.

On February 15 and 16, 1984, the underlying case was tried in the Superior Court of New Jersey; Petitioner was found guilty of two civil violations of the statute

and fined $2,000, as well as being permanently enjoined from further violations thereof.

Subsequently, Petitioner filed an appeal to the Appellate Division of the Superior Court of New Jersey; on August 5, 1985, that court affirmed both the order of contempt and the February 24, 1984 judgment. Petitioner then sought Certification to the Supreme Court of New Jersey, which denied the application during October, 1985.

Petitioner raised the issue of the validity of the statute on First Amendment grounds, and the issue of the impropriety of the actions of the Prosecutor as violative of due process, in his answer to the original Complaint; all issues were pursued throughout the Trial and Appeal, as is apparent from the Appellate Division decision constituting part of the Appendix herein.

REASONS FOR GRANTING THE PETITION

Petitioner respectfully urges this Court to address the substantial deprivation of Petitioner's rights under the First, Fifth and Fourteenth Amendments to the United States Constitution. The deprivation results from decisions of New Jersey courts that (a) Petitioner violated N.J.S. §2A:170-77.16 [the statute] on two occasions and (b) Petitioner violated a restraint entered pendente lite by the trial court.

Here, a County Prosecutor sued civilly, seeking to enjoin Petitioner from selling or offering to sell research materials (term papers, reports and the like) with knowledge, read or imputed, that the materials were intended for submission to an educational institution by a student for credit.

Initially, Petitioner contends that the production of research materials are within the ambit of First Amendment protections, Cf. Lovell v. Griffin, 303 U.S. 444, 450 (1938); Martin v. Struthers, 310 U.S. 141, 143 (1930). Petitioner, although engaged in a business organized for profit, is entitled to the full extent of those protections of speech and expression guaranteed by the First Amendment. Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748, 761 (1976); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1957).

I. THIS COURT SHOULD GRANT THE PETITION TO DECLARE INVALID A VAGUE AND OVERLY BROAD STATUTE WHICH LIMITS EXPRESSION.

Petitioner contends that the statute reaches substantially further than is necessary to protect legitimate governmental interests, Procunier v. Martinez, 416 U.S. 396, 413 (1974); improperly intrudes on freedom of expression, Schad v. Borough of

Mount Ephraim, 452 U.S. 61 (1981); and has encroached upon rights of expression by other than the least restrictive means, Erzoznick v. City of Jacksonville, 422 U.S. 205 (1975). Although these contentions are addressed to the facial invalidity of the statute, Petitioner further argues that the application of the statute to research material other than a finished product suitable for submission to an academic institution for credit is inappropriate and expressly contravened by decisions of this Court (Erzoznick, supra).

Furthermore, particularly as interpreted by the state courts, the statute is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Coates v. Cincinnati, 402 U.S. 611, 614 (1971). The statute requires Petitioner to reach conclusions as to the undisclosed intent and motivation of third persons. This is an impermissible standard, Cf. Hoffman Estates v. Flipside, Hoffman

Estates, 455 U.S. 489 (1982), because the statute does not provide fair warning as to how one is to gauge the undisclosed intent. No standards, guidelines, or factors are contained within the statute permitting any person to draw conclusions as to the unexpressed intention of a customer; therefore, the statute should be deemed invalid.

II. THIS COURT SHOULD GRANT THE PETITION TO REDRESS THE DENIAL OF EQUAL PROTECTION OF THE LAWS EMANATING FROM THE SELECTIVE AND ARBITRARY ENFORCEMENT OF THE LAW BY RESPONDENT.

Petitioner contends that Respondent's actions in conducting its investigations and prosecuting its suit at trial reflects discretionary enforcement exercised pursuant to an arbitrary classification, in violaton of Petitioner's constitutional right to the equal protection of the laws. See Burdenkircher v. Hayes, 434 U.S. 357, 364 (1978); Police Department of the City of Chicago v. Mosely, 408 U.S. 92 at 96 (1972).

Clearly, when communicative activity is sought to be suppressed or limited by government, the limiting actions of government should be subjected to demanding and harsh scrutiny to ensure that those actions are not undertaken in an unfairly selective manner. Thus, there exists impermissible inequity when the Respondent, County Prosecutor, elects to proceed against a small business while ignoring the national and multinational entities (as Encyclopedia Britannica) who engage in the same activity.

Petitioner further contends that the actions of Respondent's investigators, full-time employees of the Office of the County Prosecutor, effected an entrapment; the conduct of Petitioner was clearly the product of the creative activity of the law enforcement officials, see Sherman v. United States, 356 U.S. 369 (1958), thus constituting a violation of due process. The lower courts clearly erred in ignoring the failure of

the investigators to have identified themselves as students and the ambiguous language used by the investigators in specifying their intent, among other things. The conduct of the investigation reflects an impermissible level of participation by Respondent and his agents, acting on behalf of the State.

For these reasons, Petitioner argues that the State courts erred in finding his actions violative of the statute, to the prejudice of his constitutionally guaranteed rights.

Petitioner also appeals his adjudication of contempt, reflected in the February 1, 1983, Order. Basically, the trial court (through a different Judge) concluded that evidence substantially similar in nature to that presented on the case in chief, derived in an identical manner, was sufficient to show

a violation of the statute (and an interim restraining Order effectively tracking the statutory language). Therefore, to the extent that the basic adjudication is invalid, the contempt finding must fall. In addition, Petitioner respectfully contends that, under any standard, insufficient evidence was presented to justify a finding of contempt, particularly in the context of a First Amendment deprivation, where the burden of proof is invariably placed on parties seeking to impose any prior restraint. Freedman v. Maryland, 380 U.S. 51 (1968).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted by this Honorable Court.

Respectfully submitted,

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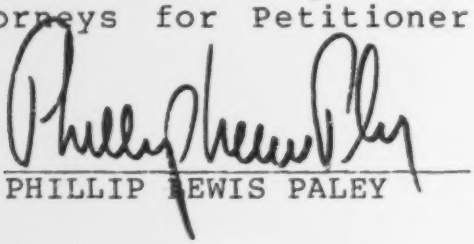
A Professional Corporation
Attorneys for Petitioner

By: 
PHILLIP LEWIS PALEY

Dated: January 9, 1986

HAROLD J. RUVOLDT, JR.,
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SUPERIOR COURT OF
NEW JERSEY
HUDSON COUNTY
CHANCERY DIVISION
DOCKET NO. C1571-83

IN THE MATTER OF JOHN S. :

MAGEE, CHARGED WITH :

CONTEMPT OF COURT.

Civil Action

ORDER OF JUDGMENT
OF CONTEMPT

This matter having come before the Court on an Order to Show Cause why John S. Magee should not be held in contempt in the presence of James E. Flynn, Esq., First Assistant Prosecutor, attorney for the Plaintiff, and Edward F. Clark, Esq., (Sciarra & Clark, Esqs.) attorney for the Respondent John S. Magee; and the Court having conducted a non-jury trial of this matter on January 17,

1984 and January 25, 1984; and the Court having considered the testimony, exhibits, briefs and arguments of counsel; and the Court having found beyond a reasonable doubt that John S. Magee was in willful contempt of the prior Order of the Honorable Robert E. Tarelton, J.S.C. of May 4, 1983; and good cause appearing;

IT IS on this day of February, 1984,

ORDERED that judgment be entered for the reasons stated by the Court in its oral opinion on January 25, 1984 as follows:

1. Adjudging that John S. Magee be found guilty of contempt of Court in that he willfully violated the prior Order of the Honorable Robert E. Tarelton entered on May 4, 1983 in the matter of Ruvoldt v. Magee, Superior Cuort of New Jersey, Chancery Division, Docket No. C1571-83;

2. Further Ordered that the Respondent John S. Magee be sentenced to a term of

five days in the Hudson County Jail and pay a fine of $500.00 together with the costs of this action forthwith.

/s/ Gregory J. Castano
GREGORY J. CASTANO, J.S.C.

HAROLD J. RUVOLDT, JR.,
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SUPERIOR COURT OF NEW
HUDSON COUNTY
CHANCERY DIVISION
DOCKET NO. C1571-83

HAROLD J. RUVOLDT, JR., Prosecutor of Hudson County, Plaintiff, vs. JOHN S. MAGEE, INDIVIDUALLY and t/a COLLEGIATE RESEARCH SYSTEMS, Defendant.	Civil Action ORDER

This matter coming on for non-jury trial before the Court on February 15 and 16,

1984 and the Court having considered the testimony, exhibits, briefs and arguments of counsel and good cause appearing and for the reasons stated in the Court's oral opinion of February 23, 1984,

It is on this day of February, 1984, ORDERED that Judgment be entered as follows:

1 On the First Count of the Amended Complaint finding the defendant, John S. Magee, individually and T/A Collegiate Research Systems guilty of a civil offense in violation of N.J.S. 2A:170-77.16 in the sale of two papers to Investigator Anthony Scott on March 29, 1983; and imposing a fine of $1,000.00 on said defendant for this offense;

2. On the Second Count of the Amended Complaint finding the defendant John S. Magee, individually and T/A Collegiate Research Systems guilty of a civil offense in violation of N.J.S. 2A:170-77.15 in the sale of a paper to Investigator Donald Wiggins

between March 24 and April 11, 1983 and imposing a fine of $1,000 on said defendant for this offense.

3. The above imposed fines, totalling $2,000.00 shall be paid to the Clerk of Hudson County on the following schedule:

$400.00 on or before March 1, 1984.
$400 00 on or before March 8, 1984;
$400.00 on or before March 15, 1984;
$400.00 on or before March 22, 1984; and
$400.00 on or before March 27, 1984.

4. On the Third Count of the Amended Complaint, a judgment is entered granting a permanent injunction ordering that the defendant, John S. Magee, individually and T/A Collegiate Research Systems, and his agents, servants and employees are hereby enjoined and restrained from preparing, offering to prepare, selling or offering for sale any term paper, thesis, dissertation, essay, report or other written, recorded, pictorial, artistic or other assignment knowing or under circumstances having reasons

to know that said assignment is intended for submission either in whole or in substantial part, under a student's name in fulfillment of the requirements for a degree, diploma, certificate, course or courses of study at any university, college, academy school or other educational institution for any fee or other remuneration.

5. Defendant's application for a stay of this Judgment is denied for the reasons expressed by the Court on February 23, 1984.

/s/ Robert E. Tarleton
ROBERT E. TARLETON, J.S.C.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2996-83 T2
A-3617-83T2

HAROLD J. RUVOLDT. JR.,
PROSECUTOR OF HUDSON
COUNTY,
Plaintiff-Respondent,

v.

JOHN S. MAGEE, INDIVIDUALLY
and t/a COLLEGIATE RESEARCH
SYSTEMS,

Defendant-Appellant.

IN THE MATTER OF JOHN S. MAGEE
CHARGED WITH CONTEMPT OF COURT

Argued June 12, 1985 - Decided Aug. 5, 1985

Before Judges Matthews, Furman and Havey.

On appeal from the Superior Court of New Jersey, Chancery Division, Hudson County.

Edward F. Clark, argued the cause of appellant (Mr. Clark on the brief).

Charles D'Amico, Assistant Prosecutor argued the cause for respondent (Harold J. Ruvoldt, Jr., Prosecutor of Hudson County, attorney; James E. Flynn, First Assistant Prosecutor on the brief).

Mark Fleming, Deputy Attorney General, argued the cause for the State of New Jersey (Irwin I. Kimmelman, Attorney General of the State of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel; Mr. Fleming on the brief).

PER CURIAM

Plaintiff, in his capacity as prosecutor of the County of Hudson, filed a verified complaint on April 13, 1983 against defendant, alleging that defendant had and continud to violate the provisions of N.J.S.A. 2A:170-77.16 by preparing and selling term papers to students "well knowing or under circumstances where [defendant] had reason to know that [the] term papers. . . were intended to be submitted. . ." by the students in fulfilment of requirements for a high school or college course of study. N.J.S.A. 2A:170-77.18 provides for the imposition of fines as

well as injunctive relief for violations of the act On May 4, 1983, Judge Tarleton issued a preliminary injunction restraining defendant from engaging in conduct proscribed by N.J.S.A. 2A:170-77.16.

On January 9, 1984, Judge Tarleton issued an order to show cause why defendant should not be held in contempt for violating the restraint for allegedly selling term papers to an undercover agent between November 30 and December 27, 1983. Judge Costanzo found the defendant guilty of contempt and sentenced him to five days in the county jail and fined him $500.

After a nonjury trial in the underlying action, Judge Tarleton found that defendant had violated the act by selling term papers on two occasions, imposed two $1,000 fines and issued a permanent injunction against future violations of the act.

On these consolidated appeals, defendant challenges both the judgment of

conviction in the underlying action, the preliminary injunction, as well as the conviction for contempt. [1] With respect to his conviction for violating N.J.S.A. 2A:170-77.16, he argues that the statute is an unconstitutional infringement of his First Amendment right of free speech and violates his substantive and procedural due process rights because it is overbroad and too vague. He also alleges selective enforcement of the statute against him and that he was entrapped into violating the act. As to his contempt conviction, defendant challenges the underlying preliminary injunction as constituting an invalid prior restraint and as being imper-

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On May 5, 1983, defendant's motion for leave to appeal and to stay the preliminary injunction pending appeal was denied. Defendant's application for leave to appeal to the New Jersey Supreme Court was also denied on May 7, 1983. Defendant's appeal from the contempt proceeding is under docket number A-3617-83 T2. Defendant's appeal from his conviction in the underlying action is under docket number A-2926-83 T2.

missibly vague. He also argues that (1) the trial court lacked personal jurisdiction over him; (2) the statute does not authorize injunctions prior to conviction and (3) that the contempt proceedings failed to provide him with adequate safeguards. We affirm both convictions.

The evidence presented by plaintiff during the trial of the underlying complaint established that defendant operated a business in Hoboken known as Collegiate Research Systems, which provided "research, writing, editing, resumes and other business research services." On March 24, 1983 Investigator Donald Wiggins of the Hudson County Prosecutor's Office visited defendant's business wearing a hidden tape recorder. Wiggins advised defendant that he needed "a 15-page original research paper." With the aid of defendant, Wiggins filled out an order form which requested the following information: subject, number of pages, due date, level

(undergraduate advanced undergraduate or graduate), bibliography and footnotes. Wiggins requested a double-spaced, typed report on nuclear arms control. The paper was prepared in a typical term-paper form entitled "The Historic Background of the Arms Race," containing a bibliography and footnotes. The paper did not contain the author's name, the purpose for which it was prepared or defendant's logo. Wiggins paid defendant $225 for the paper.

On March 29, 1983 a second investigator, Anthony Scott, also wearing a body recorder, visited defendant's business and purchased two term papers which defendant had on file. Defendant advised Scott to buy two and "combine the two of them." When Scott asked defendant if there were "any problems with this" and whether he could "hand these right in," defendant responded "well, I don't care anything what you're going [sic] with it. . . you know, I'm just selling them." Scott paid $70 for the two papers.

Defendant testified that his product was essentially research material, similar to that distributed by other reference services, such as Encyclopedia Britannica Reference Service and the New York University Copy Service. He claimed to be a broker for research and that he never intended that his work product be submitted under a student's name to an educational institution. He testified that the reason for not including the author's name on the papers sold was to prevent his customers from circumventing his service and dealing directly with the author. He estimated that 95% of his customers were college students, whose business he had solicited by advertising in the Village Voice and by distributing his business cards to passers-by near college campuses.

Judge Tarleton concluded that the materials sold by defendant did not constitute commercial-aid studies or research materials and thus did not fall within the catagories of

"assistance" and "research" which are exempt from the proscriptions of N.J.S.A. 2A:17-170-77.16. See N.J S.A. 2A:170-77.17. He concluded that plaintiff had proven beyond a reasonable doubt that defendant had violated the statute on two occasions in that he knew the papers would be submitted under Wiggins's and Scott's names, characterizing defendant's operation as a "term paper mill."

The factual basis for the contempt conviction was provided by the testimony of Hudson County Investigator Terrance Hull who stated that on December 7, 1983 he went to defendant's offices and ordered an original research paper from defendant on the subject of heroin. When Hull expressed concern about the originality of the paper, defendant assured him that the paper was unique and that even if the same topic had been ordered by another student, a different writer would have been assigned. Finding defendant in contempt of the preliminary injunction, Judge Costanzo

concluded that defendant "had to know [,] and did know [,] it [the term paper purchased by Hull] was intended for submission under a student's name in fulfillment of the requirements of a course of study at some educational institution."

Defendant first contends that N.J.S.A. 2A:170-77.16 is an infringement of his constitutionally protected rights of freedom of speech and of the press. He argues that his products are "publications," similar to "books, newspapers, and magazines " entitled to First Amendment protection.

We have no doubt that the regulated activity here the sale or offer for sale of prepared term papers, essays or other assignments, is within the ambit of the free-press and free-speech protections of the First Amendment. The statute inhibits the distribution and dissemination of information, a fundamental First Amendment right. See Lovell v. Griffin, 303 U.S. 444, 452, 55 S.Ct. 666,

82 L. Ed. 949, 954 (1938): Smith v. California, 361 U.S 147, 150, 80 S. Ct. 215 4 L. 2d. 2d 205, 209 (1959) The focus of the statutute, however, is not to regulate "pure speech" but to proscribe speech which is directed to the accomplishment of an end that the State has declared illegal when such expression consists in part of "conduct" or "action." California v. La Rue 409 U.S. 109 117, 93 S. Ct. 390, 34 L Ed 2d 342, 351 (1972); Borough of Collingswood v. Ringgold, 66 N.J. 350, 362-363 (1975). The statute's emphasis on regulating "conduct," while traditionally surrounded with lesser protection than "pure speech," nevertheless, does not remove defendant's activity from the ambit of all First Amendment protection. See Cox v. Louisiana, 379 U.S 546, 555, 85 S. Ct. 453, 465, 13 L. Ed. 2d 471, 484 (1975); Borough of Collingswood v. Ringgold, supra, 66 N.J. at 365-366

If the regulated communicative

activity is constitutionally protected to some degree, the issue becomes whether the regulation is so overbroad in proscribing the constitutionally protected activity, that it reaches farther than is permitted or necessary to fulfill the State's interest. See State v. Lee, 96 N.J. 156, 165 (1984); Town Tabacconist v. Kimmelman, 94 N.J. 85, 125 n. 21 (1983; In re Hinds, 90 N J. 604, 617-618 (1982). A regulation which restricts time, place or manner of protected free speech will survive constitutional scrutiny only if it: (1) may be justified without reference to the content of the regulated speech; (2) it serves a significant governmental interest by the least restrictive possible means; and (3) it provides for an open ample alternative means for the communication of the information. Erzoznik v. City of Jacksonville 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975); State v. Miller, 83 N.J. 402, 412 (1980); Capitol Movies, Inc. v. City of Passaic, 194 N.J. Super. 298, 303 (App. Div. 1984).

Applying that three-prong test here, we are persuaded that N.J.S.A. 2A:170-77.15 is not facially overbroad. The statute prohibits the sale or offer for sale of academic assignments, regardless of content or subject matter, only when the distributor knows or has reason to know that the assignment is intended for submission under the student's name for academic credit. Second, it clearly advances a compelling governmental interest: combatting blatant, commercialized assistance in cheating that subverts the integrity of the educational system. See Ambash, "Trapping Term Paper Cheaters by Statute: 59 A.B.A.J. 162, 165 (1973). Finally, N.J.S.A. 2A:170-77.17 provides an adequate means of disseminating research material or other academic information which is not intended for submission under the student's name to an educational institution. We therefore reject defendant's "overbroad" constitutional challenge.

Defendant's vagueness challenge is

bottomed on the assertion that the phrase "...knowing, or under the circumstances having reason to know..." [emphasis suplied], impermissibly imposes criminal liability based upon the student's state of mind, and not upon defendant's intent, requiring the seller to make a subjective determination regarding the student's mens rea. But Judge Tarleton found that defendant had actual knowledge beyond a reasonable doubt that both Wiggins and Scott intended to submit the term papers sold by defendant under their respective names to educational institutions. Because the statute clearly applies to distributors who have actual knowledge of the student's purpose and intent, the vagueness issue need not be addressed since we are satisfied that Judge Tarleton's finding of actual knowledge is supported by sufficient credible evidence in the record. See Donadio v. Cunningham, 48 N.J. 309, 351-326 (1971); State v. Zucconi 50 N.J. 361, 364 (1967); American Bank & Trust

Co. of Pennsylvania v. Lott, 193 N.J. Super. 516, 521 (App. Div. 1984), certif. granted 97 N.J. 618 (1984); cf. Ashton v. Kentucky, 384 U.S 195, 198, 86 S. Ct. 1407, 17 L. Ed. 2d 469, 471-472 (1966)

The requirement that a seller must "know" that the assignment sold will be used by a student under his name is satisfied if he is "practically certain" that the paper will be so used. See Town Tabacconist v. Kimmelman, supra, 94 N.J. at 112; N.J.S.A. 2D:2-2 (b)(2). The clear implication of Wiggins's and Scott's conversations with Magee during the transactions and the urgency of their requests for the term papers, as well as the overall format of the typewritten pages, with footnotes and bibliographies, prepared for direct submission to the education institution, amply supports a finding that defendant was "practically certain" that the papers would be submitted by Wiggins and Scott as their own work product.

There is no factual basis in the record to support defendant's contention that his rights to equal protection were violated by plaintiff based on selective enforcement of N.J.S.A. 2A:170-77.16 against him. To prevail on a "selective enforcement" challenge, defendant must demonstrate that the State's choice to prosecute him was "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." State v. Sutton, 80 N.J., 110, 121 (1979). There was absolutely no showing that the investigation of defendant's enterprise and his prosecution was based on some arbitrary or invidiuous classification.

Nor do we find a factual basis in the record to support defendant's contention that he was entrapped into violating the act. We are unable to conclude that defendant proved by a preponderance of the evidence that the investigators' conduct in ordering and purchasing the term papers created a substan-

tial risk that violations of the fact would be committed by defendant and that defendant was not otherwise predisposed to commit them. See State v. Rockholt, 96 N.J. 570, 577 (1984); N.J.S.A. 2C:2-12(a)(2)

Defendant's first challenge to his contempt conviction is that the preliminary injuction was impermissibly vague and an invalid prior restraint on protected First Amendment rights. But "a party cannot on an appeal from a judgment of conviction of contempt assert that the court order which he had contemned was based on error of law or fact, but rather the contemnor's recourse is to take a direct appeal from the court's order." In re Tiene, 17 N.J. 170, 177 (1954); see also Walker v. Birmingham, 388 U.S. 307, 320, 87 S. Ct. 824, 18 L. Ed. 2d 1210, 1219 (1967); Matter of Felmeister, 95 N.J. 431, 444-446 (1984); In re Contempt of Carton, 48 N.J. 9, 16-17 (1966); State, In re Contempt of Frankel, 119 N.J. Super. 579, 581 (App. Div.

1972): certif. den. 62 N.J. 75 (1972), cert. den 409 U.S. 1125 (1973).

Here while defendant sought leave to appeal the injunctive order (which was denied) the thrust of his argument before us for leave was based on procedural deficiencies in the manner by which the injunctive order was obtained by plaintiff, including the lateness of service of the verified complaint upon defendant, and not on constitutional grounds. We therefore view the substantive issues now presented as being untimely raised.

We also reject defendant's contention that the trial court lacked personal jurisdiction over him since he was not served with a copy of the complaint within the time mandated by the order to show cause of R. 4:52-1. Defendant was timely served with the order but, inadvertently, not with the verified complaint within the ten-day period prescribed by R. 4:52-1(b). Deficiences in

the issuance and service of a summons under R. 4:4-1 do not preclude personal jurisdiction of the court, Rogers v. Dubac, 52 N.J. Super. 360, 364 (Law Div. 1958), but may support a basis for dismissal of the action under R. 4:37-2(a). The complaint, while not served with the order to show cause, was served upon defendant on April 27, 1983, seven days before the return date of the order. Absent here is any showing of prejudice to defendant as a result of the late service of the verified complaint. See Byrd v. Ontario Freight Lines Corp., 39 N.J. Super. 277 (App. Div. 1956) Vines v. Orange Memorial Hospital, et al., 192 N.J. Super. 496, 498-499 (App. Div. 1984), remanded 93 N.J. 254 (1984). Defendant's challenge on personal jurisdiction grounds is therefore rejected.

We have carefully considered the remaining contentions raised by defendant in the context of the record of the contempt proceedings and underlying trial and are

satisfied that they are completely without merit. R. 2:11-3(e)(2) In re Buehrer, 50 N.J. 501 (1967); In re Yengo 84 N.J. 111 (1980).

Affirmed.

BEST AVAILABLE COPY

SUPREME COURT OF NEW JERSEY
C-199 SEPTEMBER TERM 1985

24,514

HAROLD J. RUVOLDT, JR., PROSECUTOR OF HUDSON COUNTY, Plaintiff-Respondent,	:	
vs.	:	ON PETITION FOR CERTIFICATION
JOHN S. MAGEE, INDIVIDUALLY and t/a COLLEGIATE RESEARCH SYSTEMS, Defendant-Petitioner.	:	

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-2996/3617-83T2 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs and it is further

ORDERED that the appeal in the within matter is dismissed pursuant to R. 2:12-9.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 15th day of October, 1985.

CLERK OF THE SUPREME COURT

Supreme Court, U.S.
FILED
FEB 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1193

In The

Supreme Court of the United States

October Term, 1985

JOHN S. MAGEE, INDIVIDUALLY and T/A COLLEGIATE RESEARCH SYSTEMS,
Petitioner,

v.

HAROLD J. RUVOLDT, PROSECUTOR OF HUDSON COUNTY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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No. 85 - 1193

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JOHN S. MAGEE, INDIVIDUALLY and T/A COLLEGIATE RESEARCH SYSTEMS,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

COUNTERSTATEMENT OF THE CASE

The present petition for a writ of *certiorari* filed by John S. Magee and Collegiate Research Systems seeks review of an order of the New Jersey Supreme Court declining to review an appellate court decision upholding the constitutionality of *N.J.S.A.* 2A:170-77.16 and rejecting the claims of selective enforcement of the statute. In so doing, the appellate court upheld the trial court's rejection of Magee's constitutional claims. The facts leading to this petition may be briefly summarized.

Magee operates a business in Hoboken, New Jersey known as Collegiate Research Systems which prepares and

sells research papers on diverse academic subjects (Pa12).* Prior to this time, Magee had been operating Collegiate Research Systems in New York. *People v. Magee,* 423 *N.Y.S.*2d 417 (Supreme Court 1979). On March 24, 1983 Investigator Donald Wiggins of the Hudson County Prosecutor's Office visited Magee's business wearing a hidden recording device. Wiggins presented himself as a student and ordered a fifteen page paper on nuclear arms control. In response to Magee's questions, Wiggins stated that the paper was for an undergraduate political science course and was due at the end of the semester. Wiggins completed an order form which asked for the subject matter of the paper, the number of pages the paper was to be, whether the paper was to be at the undergraduate or graduate level and whether a bibliography and footnotes were required. Wiggins received a double spaced typed paper entitled "The Historic Background of the Arms Race," which contained footnotes and a bibliography. The cover page did not list an author's name or contain any other identifying information. Wiggins paid Magee $225 for the paper (Pa12 to Pa13).

On March 29, 1983 Investigator Anthony Scott of the Hudson County Prosecutor's Office visited Magee's business wearing a hidden recording mechanism. Scott purchased two papers on capital punishment. When Scott asked whether he could just hand the papers in without any problems, Magee replied "I don't care anything what you're going with it . . . I'm just selling them." Scott paid Magee $70 for the two papers (Pa13).

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* This notation refers to the appendix to the Petition for a Writ of Certiorari filed by Magee in this matter.

On April 13, 1983 the Hudson County Prosecutor filed a verified complaint charging Magee with continued violation of *N.J.S.A.* 2A:170-77.16 by preparing and selling term papers to students knowing, or under circumstances having reason to know, that the papers were to be submitted by high school or college students in fulfillment of their academic requirements. Following a hearing held on May 4, 1983, a preliminary injunction was issued restraining Magee from engaging in conduct prohibited by *N.J.S.A.* 2A:170-77.16 (Pa9 to Pa10).

On December 7, 1983, Investigator Terrence Hull of the Hudson County Prosecutor's Office visited Magee's business wearing a hidden recording device. Hull ordered a paper on Cocaine. He was assured by Magee that the paper was original and that if another student selected the same topic a different writer would be assigned. Hull paid Magee $105.00 for the paper (Pa15).

On January 9, 1984 an order to show cause why Magee should not be held in contempt was issued. Magee was found guilty of contempt, sentenced to five days in the county jail and fined $500.00 (Pa1 to Pa3).

After a nonjury trial on the underlying action, on February 23, 1984 Magee was found guilty of two violations of *N.J.S.A.* 2A:170-77.16, fined $1.000 for each violation and was permanently enjoined from future violations of the Act (Pa4 to Pa7).

Magee appealed both the contempt citation and the *N.J.S.A.* 2A:170-77.16 convictions. Because Magee challenged the constitutionality of a New Jersey statute, the Attorney General was contacted by the Clerk of the Ap-

pellate Division to ascertain whether the Attorney General would defend the validity of *N.J.S.A.* 2A:170-77.16 on appeal. Pursuant to *N.J. Court Rule* 2:5-h(1), the Attorney General filed a brief in support of the constitutionality of *N.J.S.A.* 2A:170-77.16.

In an opinion dated August 5, 1985, the Appellate Division rejected all of Magee's arguments including his claim that *N.J.S.A.* 2A:170-77.16 is unconstitutionally vague and overbroad (Pa8 to Pa26). The Appellate Division observed that *N.J.S.A.* 2A:170-77.16 regulates communicative conduct rather than pure speech and explained that a three-pronged test is to be applied to determine if such regulation is constitutionally permissible (Pa16 to Pa17).

> If the regulated communicative activity is constitutionally protected to some degree, the issue becomes whether the regulation is so overbroad in proscribing the constitutionally protected activity, that it reaches farther than is permitted or necessary to fulfill the State's interest. *See State v. Lee,* 96 *N.J.* 156, 165 (1984); *Town Tobacconist v. Kimmelman,* 94 *N.J.* 85, 125 n.21 (1983); *In re Hinds,* 90 *N.J.* 604, 617-618 (1982). A regulation which restricts time, place or manner of protected free speech will survive constitutional scrutiny only if it: (1) may be justified without reference to the content of the regulated speech; (2) it serves a significant governmental interest by the least restrictive possible means; and (3) it provides for an open ample alternative means for the communication of the information. *Erznoznik v. City of Jacksonville,* 422 *U.S.* 205, 95 *S.Ct.* 2268, 45 *L.Ed.*2d 125 (1975); *State v. Miller,* 83 *N.J.* 402, 412 (1980); *Capitol Movies, Inc. v. City of Passaic,* 194 *N.J. Super.* 298, 303 (App. Div. 1984).
>
> Applying that three-prong test here, we are persuaded that *N.J.S.A.* 2A:170-77.16 is not facially overbroad. The statute prohibits the sale or offer for sale

> of academic assignments, regardless of content or subject matter, only when the distributor knows or has reason to know that the assignment is intended for submission under the student's name for academic credit. Second, it clearly advances a compelling governmental interest: combatting blatant, commercialized assistance in cheating that subverts the integrity of the educational system. *See* Ambash, "Trapping Term Paper Cheaters by Statute", 59 *A.B.A.J.* 162, 165 (1973). Finally, *N.J.S.A.* 2A:170-77.17 provides an adequate means of disseminating research material or other academic information which is not intended for submission under the student's name to an educational institution. We therefore reject defendant's "overbroad" constitutional challenge. [Pa17 to Pa19].

The Appellate Division also rejected Magee's claim that the statutory language, "or under circumstances having reason to know," is vague because Magee was found to have actual knowledge beyond a reasonable doubt of the purchaser's intent to submit the term paper under their names to their educational institutions (Pa19 to Pa21). Finally, the Appellate Division rejected Magee's selective enforcement and entrapment claims, his challenge to the preliminary injunction, and his other arguments (Pa22 to Pa26).

On August 26, 1985, Magee filed a Notice of Petition for certification with the Supreme Court of New Jersey. By order dated October 15, 1985, the Supreme Court of New Jersey denied the Petition for Certification (Pa27 to Pa28).

On January 10, 1986, Magee filed the present petition for a writ of *certiorari* to the Supreme Court of New Jersey.

———o———

ARGUMENT

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW A STATE COURT DECISION WHICH DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT AND WHERE THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT.

It is a fundamental concept that review by the United States Supreme Court on Writ of *Certiorari* "is not a matter of right, but of judicial discretion . . . ." *Supreme Court Rule* 17. Given such discretion, it has been the long-standing practice of the Supreme Court to grant the writ "only when there are special and important reasons therefor." *Ibid.* Further, the Court will generaly grant *certiorari* from a state court determination only where the state court has decided a federal question of first impression or in a way in conflict with applicable decisions of the Supreme Court or other courts. *Id., Rule* 17(1) (b and c). None of these reasons exist in the present case, and the petition should therefore be denied.

This case involves a challenge by Magee to the constiutionality of *N.J.S.A.* 2A:170-77.16 which attempts to eradicate commercialized cheating by prohibiting, *inter alia,* the sale and offer for sale of assignments which the seller knows or has reason to know will be submitted in whole or substantial part under a student's name in fulfillment of academic requirements. Magee also attacks the contempt proceeding and alleges improper prosecutorial conduct. The State is participating in this matter only to defend the constitutionality of *N.J.S.A.* 2A:170-77.16.

Magee argues that *N.J.S.A.* 2A:170-77.16 is overbroad and vague. The statute provides:

> No person shall, for any fee, or other remuneration, prepare, offer to prepare, cause to be prepared, sell or offer for sale any term paper, thesis, dissertation, essay, report or other written, recorded, pictorial, artistic or other assignment knowing, or under the circumstances having reason to know, that said assignment is intended for submission either in whole or substantial part under a student's name in fulfillment of the requirements for a degree, diploma, certificate, course or courses of study at any university, college, academy, school or other educational institution. [*N.J.S.A.* 2A:170-77.16]

The prohibitions of *N.J.S.A.* 2A:170-77.16 are limited by *N.J.S.A.* 2A:170-77.16 which reads:

> Nothing contained in this act shall prevent any person from providing tutorial assistance, research material, information or other assistance to persons enrolled in a university, college, academy, school or other educational institution, which is not intended for submission directly or in substantial part as an assignment under the student's name to such educational institution in fulfillment of the requirements for a degree, diploma, certificate of course of study. Nor shall any person be prevented by this act from rendering services for a fee which include the typing, research, assembling, transcription, reproduction or editing of a manuscript or other assignment which he has not prepared at the request of or on behalf of the purchaser. [*N.J.S.A.* 2A:170-77.17]

In a facial challenge alleging overbreadth, the first task is to determine whether the statute reaches a substantial amount of constitutionally protected conduct. If the statute does not so reach, the overbreadth claim must fail. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 *U.S.* 489, 494, 102 *S.Ct.* 1186, 1191, 71

*L.Ed.*2d 362, 369 (1982). Where the enactment does prohibit protected communicative conduct, as opposed to pure speech, a sufficiently important governmental interest in regulating the nonspeech element can justify the incidental limitations of the First Amendment freedoms. *United States v. O'Brien,* 391 *U.S.* 367, 376 88 *S.Ct.* 1673, 1678-1679, 20 *L.Ed.*2d 672, 679-680 (1968); *Cox v. Louisiana,* 379 *U.S.* 536, 555, 85 *S.Ct.* 453, 464, 13 *L.Ed.*2d 471, 484 (1965); *California v. LaRue,* 409 *U.S.* 109, 117, 93 *S.Ct.* 390, 396, 34 *L.Ed.*2d 342, 351 (1972). As explained in *Giboney v. Empire Storage & Ice Co.,* 336 *U.S.* 490, 502, 69 *S.Ct.* 684, 691, 93 *L.Ed.* 834, 843-844 (1949)

> [I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. Such an expansive interpretation of the constitutional guarantees of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society [citations omitted].

A governmental regulation of communicative conduct withstands constitutional scrutiny if it furthers an important or substantial governmental interest, if it can be justified without reference to the content of the regulated speech and if sufficient alternative channels remain for the communication of the information. *United States v. O'Brien, supra,* 391 *U.S.* at 377, 88 *S.Ct.* at 1679, 20 *L.Ed.* 2d at 680. In the instant case, it is clear that *N.J.S.A.* 2A:170-77.16 is not a direct infringement upon either noncommercial or commercial speech. The enactment does not limit the seller's right to engage in free speech, free

press or the dissemination of information. Rather the statute prohibits the sale and offer for sale of assignments the seller knows will be submitted in whole or in substantial part under a student's name in fulfillment of a requirement of an educational institution. It is commercialized cheating, the selling of materials known to be utilized to effect plagiarism, which is prohibited, not the writing or sale of research material. The act therefore does not restrict speech as such, but simply prohibits the knowing sale of assignments to be used for illicit cheating. The statute then does not embrace either noncommercial or commercial speech. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra,* 455 *U.S.* at 496-497, 102 *S.Ct.* at 1192, 71 *L.Ed.*2d at 370-371.

Assuming that the statute is viewed as limiting commercial speech, it is well established that a government may regulate illicit activities such as plagiarism in the classroom. Because the act is aimed only at sales of assignments which are used as part of cheating schemes, the statute is valid. Moreover, the overbreadth doctrine does not apply to commercial speech and Magee's overbreadth claims are therefore insubstantial. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra,* 455 *U.S.* at 496-497, 102 *S.Ct.* at 1192, 71 *L.Ed.*2d at 370; *Town Tobacconist v. Kimmelman,* 94 *N.J.* 85, 126 (1983).

Moreover, even if *N.J.S.A.* 2A:170-77.16 is considered as a restriction upon conduct which involves a significant communicative element, such as burning a draft card or marching in an anti-nuclear protest, it is clear that the act withstands the multi-pronged test enunciated in *O'Brien, supra.* As explained by the Appellate Division,

> The statute prohibits the sale or offer for sale of academic assignments, regardless of content or subject matter, only when the distributor knows or has reason to know that the assignment is intended for submission under the student's name for academic credit. Second, it clearly advances a compelling governmental interest. combatting blatant, commercialized assistance in cheating that subverts the integrity of the educational system. Finally, *N.J.S A.* 2A:170-77.17 provides an adequate means of disseminating research materials or other information which is not intended for submission under the student's name to an educational institution. [Pa19].

The statute furthers the important State interest in eliminating cheating in the academic setting and so insuring that students receive a thorough and quality education. *N.J.S.A.* 2A:170-77.16 accomplishes this goal without reference to the content of the purchased assignments and specifically provides in *N.J.S.A.* 2A:170-77.17 for the operation of research and tutorial enterprises which do not knowingly aid in cheating schemes. Because the statute withstands the strict scrutiny accorded regulations of communicative conduct, the Appellate Division properly rejected Magee's overbreadth argument.

Magee's vagueness challenge to the "or under the circumstances having reason to know" language of *N.J.S.A.* 2A:170-77.16 was properly dismissed by the State court because Magee was found to have actual knowledge that the papers purchased from him by the undercover officers were to be submitted under the purchasers' names and the "having reason to know" phrase of the statute was therefore not applied to him. It is well established that a person who engages in conduct which is clearly proscribed by an enactment cannot complain of the vague-

ness of the law as applied to others. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra,* 455 *U.S.* at 495, 102 *S.Ct.* at 1191, 71 *L.Ed.*2d at 370; *Parker v. Levy,* 417 *U.S.* 733, 756, 94 *S.Ct.* 2547, 2562, 41 *L.Ed.*2d 439, 458 (1974). The State court's dismissal of Magee's vagueness argument was clearly proper because Magee's action, the sale of assignments the seller knows will be used in a cheating scheme, is clearly proscribed by the act.

In sum, the law at issue serves a valid purpose and addresses a serious problem affecting educational institutions. The New Jersey Legislature has chosen to address this problem by basing its enactment upon a Model Act. See Ambash, "Trapping Term Paper Cheaters by Statute," 59 *A.B.A.J.* 162, 165 (Feb. 1973). The law is narrowly drafted to avoid precisely the constitutional concerns raised by Magee and the State therefore submits that the constitutional challenge to *N.J.S.A.* 2A:170-77.16 is without merit and that the petition for a writ of *certiorari* should accordingly be denied.

———o———

CONCLUSION

For the aforementioned reasons, it is respectfully submitted that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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DATED: February 11, 1986

85-1198

Supreme Court, U.S.
FILED
FEB 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOHN S. MAGEE, Individually and
t/a COLLEGIATE RESEARCH SYSTEMS,

Petitioner,

vs.

HAROLD J. RUVOLDT, JR., Prosecutor
of Hudson County,

Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

A. Whether *N.J.S.A.* 2A:170-77.16 unconstitutionally infringes upon freedom of speech and freedom of the press.

B. Whether *N.J.S.A.* 2A:170-77.16 is unconstitutionally vague and overly-broad.

C. Whether petitioner was denied equal protection of the laws by alleged selective enforcement of *N.J.S.A.* 2A:170-77.16.

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STATEMENT OF THE CASE

I. Ruvoldt v. Magee (Procedural History):

Petitioner, John S. Magee, operates a business known as Collegiate Research Systems in Hoboken, New Jersey. A verified complaint was filed on April 13, 1983. Petitioner was charged with two violations of *N.J.S.A.* 2A:170-77.16. The complaint sought the imposition of fines and injunctive relief. On May 4, 1983, after a hearing before the Honorable Robert E. Tarleton, J.S.C., the Court issued a preliminary injunction which restrained petitioner from doing acts proscribed by *N.J.S.A.* 2A:170-77.16.

A trial was held before Judge Tarleton (without a jury) on February 15 and 16, 1984. On February 23, 1984, the Court found John S. Magee Guilty of each violation. Fines were imposed, and a permanent injunction was granted.

An appeal was taken to the Superior Court of New Jersey, Appellate Division. In a *per curiam* opinion dated August 15, 1985, the adjudications below were affirmed. On October 15, 1985, the

Supreme Court of New Jersey denied a petition for certification.

The Petition for Writ of Certiorari was served upon Respondent on January 14, 1986.

II. IN THE MATTER OF JOHN S. MAGEE, CHARGED WITH CONTEMPT OF COURT (PROCEDURAL HISTORY):

On January 9, 1984, an Affidavit was filed in the Superior Court of New Jersey asserting that John S. Magee was in contempt of court. Judge Tarleton issued an Order directing petitioner to show cause before the Honorable Gregory J. Castano, J.S.C. why he should not be held in contempt. Trial was held before Judge Castano (sitting without a jury) on January 17, 1984. On January 25, 1984, Judge Castano found John S. Magee to be in contempt of the preliminary injunction dated May 14, 1983. By Order dated February 1, 1984, John S. Magee was sentenced to pay a fine in the amount of five hundred dollars and to be incarcerated for five days in the County Jail.

This matter was consolidated on appeal with the convictions for violationsof *N.J.S.A.* 2A:170-77.16. The adjudication of contempt was affirmed.

III. RUVOLDT V. MAGEE (UNDERLYING FACTS):

On March 24, 1983, in furtherance of an investigation into alleged violations of *N.J.S.A.* 2A:170-77.16, Hudson County Prosecutor's Investigator Donald Wiggins visited Collegiate Research in an undercover capacity. Wiggins recorded his conversation with John S. Magee. Investigator Wiggins ordered an original, fifteen-page paper written to his specifications on nuclear arms control at a cost of $12.00 per page. The tenor of the conversation between Investigator Wiggins and John Magee clearly indicated that the paper was being purchased by a student for submission to an institution of higher education. Petitioner asked whether the paper should be of graduate or undergraduate level, and when Wiggins said "undergraduate," Magee asked "what

year?" Petitioner inquired, "What's your due date?" and Wiggins replied that he had to have it at the end of the semester, but he could get a few brownie points by submitting it a few days early. Wiggins and Magee discussed an article about Collegiate Research which had appeared in a local newspaper. Petitioner assured Investigator Wiggins that he would not get into trouble for dealing with him. Wiggins asked whether the paper would be ready to hand in for the 10th. Magee replied that it would.

In placing his order with John Magee, Investigator Wiggins completed an order form. That form asked for a detailed description of the type of paper. The form contained instructions to the writer telling him (1) what to include in each five-page segment of the paper, (2) whether to prepare a bibliography and (3) if footnotes were to be used, where they should be placed.

On March 29, 1983, Investigator Wiggins returned to Collegiate Research and again recorded his conversation with John Magee. Wiggins paid

Magee $180.00 cash. The paper which Wiggins received had a title page without attribution. The paper was in a format ready to be submitted by a student without the necessity of re-typing.

On March 29, 1983, Prosecutor's Investigator Anthony Scott visited Collegiate Research and also recorded his conversation with John Magee. He purchased term papers (which were in Magee's files) on capital punishment for $70.00. Investigator Scott asked, "There's no problem with this, right? I can hand this right in?" to which petitioner replied that he didn't care what Scott was going to do with it. Magee said that he was just selling it; however, he pointed out, "It's all footnoted." Investigator Scott also asked about the recent newspaper article concerning Collegiate Research. Scott said something about people who "take papers from other people." Petitioner made a nebulous reply.

At trial, John S. Magee asknowledged his voice on the taped conversations with Wiggins and Scott. He gave no explanation of his remarks. Magee

testified that during 1982 and 1983, he employed someone to distribute his business cards on street corners near college campuses. He told the Court that, between September 1982 and April 1983, he sold 206 original papers written to the purchasers' specifications and between April 1983 and February 1984 he sold 357 such papers. These academic papers were prepared by writers whom petitioner employed. John Magee explained that once a paper had been prepared, a copy was placed into the files (for which a catalog was maintained). Thereafter, another student may purchase such a paper from those on file. Petitioner estimated that he sold an equal number of original papers and papers on file. Magee estimated that 95% of his customers between September 1982 and February 1984 were college students.

Petitioner testified that he had been aware of the provisions of *N.J.S.A.* 2A:170-77.16 since the enactment of that law. Prior to moving to 70 Hudson Street, he operated in New York, where he had been enjoined for violating a statute similar to *N.J.S.A.* 2A:170-77.16.

The trial court determined that John S. Magee was in the business of preparing papers on various academic subjects primarily for sale to students in a format that can be submitted under a student's name in fulfillment of academic requirements. Judge Tarleton, in his findings of fact, accurately described Collegiate Research System's as a "term paper mill." The record conclusively and beyond a reasonable doubt convinced the Court that John S. Magee engaged in conduct contrary to *N.J.S.A.* 2A:170-77.16.

IV. IN THE MATTER OF JOHN S. MAGEE, CHARGED WITH CONTEMPT OF COURT (UNDERLYING FACTS):

On May 4, 1983, Judge Robert E. Tarleton entered a preliminary injunction restraining John S. Magee, individually and trading as Collegiate Research Systems, its agents, servants and employees from

> preparing, offering to prepare, selling or offering for sale any term paper, thesis, dissertation, essay, report or other written, recorded, pictorial, artistic or other assignment knowing, or under circumstances having reason to know, that said assignment is

> intended for submission either in whole or substantial part under a student's name in fulfillment of the requirements for a degree, diploma, certificate, course or courses of study at any university, college, academy, school or other educational institution for any fee or other remuneration, in violation of *N.J.S.A.* 2A:170-77.16 until the further order of the Court.

On November 30, 1983, Prosecutor's Investigator Terrence Hull placed a telephone call to Collegiate Research and tape-recorded the conversation. Mr. Hull inquired whether he could obtain a five page paper by the following week. Several prices were quoted to Hull. Thereafter, on December 7, 1983, Investigator Hull visited Collegiate Research and recorded his conversation with John Magee. Hull ordered a paper on cocaine and paid $105.00. He filled out an order form (as described *supra*). Investigator Hull asked petitioner whether the blank marked "subject" on the form meant title of the course for which the paper was being written. Magee responded that he did not get involved in any of that and directed Hull's attention to a disclaimer sign hanging nearby. Investigator Hull left and returned a few

minutes later. He changed the topic to heroin, telling petitioner that a friend told him cocaine could not be used for the assignment.

On December 28, 1983, Investigator Hull picked up his paper. He recorded his conversation with John Magee. Hull asked whether there was a danger that someone else might have ordered the same topic. Petitioner assured him that this could not occur. Magee pointed out that the paper had numerous footnotes, to which Hull replied that's what his teacher liked.

The paper purchased by Investigator Hull was in a format which could be handed in without re-typing. The paper had a complete bibliography and extensive footnotes. There was no attribution.

Judge Castano found that the purported disclaimers posted by petitioner were insincere and were merely intended as a defense to any future actions. The Judge determined that Magee had reason to know that the assignment was intended for submission in fulfillment of a student's learning require-

ments. The Court was convinced beyond a reasonable doubt that petitioner had willfully and deliberately violated the preliminary injunction. John S. Magee was adjudicated Guilty of Contempt.

POINT ONE

N.J.S.A. 2A:170-77.16 DOES NOT INFRINGE UPON PETITIONER'S FREEDOM OF SPEECH OR FREEDOM OF THE PRESS.

There is no First Amendment right to aid and abet cheating students to defraud educational institutions. Petitioner claims that he is a mere disseminator of information whose constitutional right of free expression has been abridged by the statute in question. This argument misconceives the statutory restrictions. *N.J.S.A.* 2A:170-77.16 in no way interferes with the content of expression. It does, however, make unlawful the preparation or sale of materials which the seller knows will be used by students in a plagiaristic manner.

In *People v. Magee,* 423 *N.Y.S.* 2*d* 417 (S. Ct. 1979), the Court upheld a similar New York law against the same type of constitutional attack by petitioner herein. Judge Wallach correctly found that even though papers sold by Magee could be used lawfully, the statute interdicting them was not thus

rendered unconstitutional. 423 *N.Y.S. 2d* at 419. He analogized, reasonably, that "(a) gaming device which *could* be played for sheer entertainment may be outlawed if the purpose to which it is put is gambling." *Id.*, at 420. The New York court noted that the *format* of Magee's product was designed for direct submission to an academic institution, and this indicated unlawful intended use. *Id. N.J.S.A.* 2A:170-77.16 does not proscribe the dissemination of ideas. The statute merely proscribes the distribution of term papers, theses, dissertations essays and reports which the distributor knows or, under the circumstances, has reason to know will be used deceptively.

The constitutional protections afforded commercial speech are less than those provided other constitutionally guaranteed expression. Commercial speech may be regulated or banned if it proposes an illegal transaction. In the case at bar, Magee's business is commercial in nature. Collegiate Research Systems distributes its product for an illegal purpose

(to defraud educational institutions). Students obtain papers which they submit fraudulently as their own work. It is proper for the Legislature to regulate such speech, because it proposes an illegal transaction. The tenor and content of Collegiate Research Systems advertising and solicitation are indicative of the unlawful intent of this business operation, the supplying of papers to students so that they may be submitted by these purchasers to their educational institutions in violation of *N.J.S.A.* 2A:170-77.16. Petitioner claims that Collegiate Research Systems is virtually identical to Encyclopedia Britannica Research Service and says that his customers include government and corporate officials and public interest groups, yet, by his own estimate, 95% of petitioner's customers are college students!

Petitioner's conduct is no more deserving of First Amendment protection as free speech than polygamy, the use of drugs (*i.e.*, peyote, marijuana, hashish, LSD), or the handling of poisonous snakes have received under the guise of religious freedom.

In *Cantwell v. State of Connecticut,* 310 *U.S.* (1940), the Supreme Court repeated the "belief - action dichotomy" applicable to First Amendment cases. The Court observed that the First Amendment embraces two concepts — freedomto believe and freedom to act. The first is absolute, but the second cannot be. 310 *U.S.* at 303. The First Amendment guarantees freedom to disseminate information and ideas; however, that amendment does not guarantee petitioner the absolute right to sell his product in a *form* which readily lends itself to deceptive use. The New Jersey Legislature enacted *N.J.S.A.* 2A:170-77.16 in response to a rampant epidemic of plagiarism which was fostered by "ready-to-submit" term papers. The *format* of the product sold by John S. Magee is the essence of the statutory violation. He was not selling research monographs (a mere study aid). Such sales are permitted. See *N.J.S.A.* 2A170-77.17.* Petitioner's sanctimonious and pious invocation of the First Amendment does not alter the reality that he knowingly promoted

plagiarism. The State may and has properly declared such *conduct* to be unlawful. Petitioner is not advancing ideas, nor is he advocating any philosophy. He is simply exploiting a market. His product is clearly a tool of deception. The State may attack such deception *at the source,* and by enactment of *N.J.S.A.* 2A:170-77.16, New Jersey has done so.

The Supreme Court has found laws which inhibit the receipt of information to be unconstitutional. *See Lovell v. City of Griffin,* 303 *U.S.* 444 (1938) [ordinance which prohibited distribution of literature of any kind without permission of city manager]; *Thomas v. Collins,* 323 *U.S.* 516 (1945) [law which required union organizer to register before soliciting members]; *Griswold v. Connecticut,* 381 *U.S.* 479 (1965) [law which penalized anyone who assisted or counseled (*ie.*, provided information about) use of

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* Nothing contained in this act shall prevent any person from providing tutorial assistance, research material, information or other assistance to persons enrolled in a university, college, academy, school or other educational institution, which is not intended for submission directly or in substantial part as an assignment under the student's name to such educational institution in fulfillment of the requirements for a degree, diploma, certificate or course of study. . . .

contraceptives]; *Bigelow v. Virginia*, 421 *U.S.* 809 (1975) [law which proscribed dissemination of information about the availability of abortions in New Jersey, where they were legal]; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 *U.S.* 748 (1976) [statute which prohibited advertisement by licensed pharmacists of prices for prescription drugs]; *Bates v. State Bar of Arizona, 433 U.S.* 350 (1970) [prohibition on advertisement of fees for legal services]. The Court distinguished the right to *possess* obscene material in the privacy of one's home — *Stanley v. Georgia*, 394 *U.S.* 557 (1969) — from the right to distribute such material. *United States v. Twelve 200-Foot Reels of Super 8mm Film*, 413 *U.S.* 123 (1973). Students have a constitutional right of access to information; however, the First Amendment does not guarantee the right to have a term paper, thesis or dissertation "ghost-written".

POINT TWO

N.J.S.A. 2A:170-77.16 IS NOT VAGUE OR OVERLY-BROAD.

The product sold by Collegiate Research Systems constitutes "commercial speech," not "pure speech." The overbreadth doctrine does not apply to commercial speech. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 *U.S.* 489, 496-497 (1982).

A statute falls for vagueness if men of common intelligence must necessarily guess at its meaning and differ as to its application. *Baggett v. Bullitt*, 377 *U.S.* 360, 367 (1964). *N.J.S.A.* 2A:170-77.16 must be read in conjunction with *N.J.S.A.* 2A:170-77.17. The legislative intent is clear. The average reasonable man cannot fail to recognize a "term paper," "thesis" or "dissertation." These forms of exposition are readily distinguishable from a study guide or research monograph.

Petitioner asserts that the subject statute does not define the offense in unmistakable language. The

statute allows some research to be prepared and sold but prohibits it where the seller knows or where from attendant circumstances he has reason to know that the material is intended for submission under a student's name to fulfill a course requirement. Petitioner asserts that he is being held liable based upon the intent of his customer. Magee alleges that such a transferred intent renders the statue unconstitutionally vague. This analysis is not applicable to *N.J.S.A.* 2A:170-77.16. Petitioner's guilt is not based upon the buyer's intent but upon petitioner's knowledge.* That knowledge is inferred from the seller's statements to purchasers and purchasers' statements to the seller. Knowledge is also inferred from a pattern of marketing that suggests, encourages and fails to *properly* discourage unlawful use of the product.

From the conversations between Magee and the Prosecutor's Investigators, it is clear that peti-

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* The fact that neither Investigator Wiggins nor Investigator Scott was actually a student enrolled in an academic institution and that neither actually intended to submit the papers sold by petitioner in fulfillment of course requirements is irrelevant to Magee's culpability.

tioner knew he was dealing with purported students who wanted to buy papers to hand in for course assignments; Petitioner's pattern of marketing, as shown by his advertising, is geared towards the college student, and, as indicated in *People v. Magee, supra.* at 420, "These typewritten papers, in a format designed for direct submission, and taken together with the defendant's seductive sales literature are full proof of unlawful intended use."

Petitioner's arguments that his services are comparable to legitimate research services provided by companies such as Encyclopedia Britannica are specious. There are significant differences in format, in attribution, in design and, most particularly, in purpose between such organizations and Collegiate Research Systems. See *State v. Saksniit,* 332 *N.Y.S* 2*d,* 343, 348-349 (S.Ct. 1972).

Petitioner asserts that the statute is also vague because it allows a finding of guilt not only based on actual knowledge but also under circumstances where the seller has reason to know that the

paper will be put to the prohibited use. It should be noted that Judge Tarleton found beyond a reasonable doubt *actual* knowledge on Magee's part. Referring to the conversations between Wiggins and Scott and Magee, Judge Tarleton found that Magee had engaged on those dates in the sale of a paper which Magee *knew* was intended for submission to an educational institution in violation of the statute. Findings of the trial court indicate that Magee knew the intention of the purchasers when he made these sales. The Judge also found Magee's assertions to the contrary to be unbelievable.

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POINT THREE

THERE IS NOTHING IN THE RECORD TO SUPPORT A CHARGE OF SELECTIVE ENFORCEMENT OF THE LAW IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

Petitioner argues that his right to equal protection of the law has been violated by the selective enforcement of *N.J.S.A.* 2A:170-77.16 against him by respondent. There is nothing in the record to suggest any support for this position. Some selectivity in the enforcement of the law is not a denial of constitutional rights. Equal protection is denied only if the selection is deliberately based upon impermissible standards such as race, religion or other arbitrary classification. *Oyler v. Boles*, 368 *U.S.* 448, 456 (1962). The facts do not support the selection of John S. Magee for investigation based upon any such impermissible criteria. Rather, petitioner was prosecuted for a violation of this statute because the notorious manner in which he was flaunting the law came to the attention of respondent.

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POINT FOUR

PETITIONER WAS NOT ENTRAPPED.

Both Judge Tarleton and Judge Castano found that petitioner had not been entrapped. The most recent expression by the Supreme Court of New Jersey on the law of entrapment is found in *State v. Rockholdt*, 96 *N.J.* 570 (1984). There the Court held that under the Penal Code, the burden to prove entrapment is upon the defendant (by a preponderance of the evidence). To establish entrapment, a defendant must show both (1) that the police conduct created a substantial risk that the crime would be committed by a person not disposed to commit it and (2) that the police conduct caused the particular defendant to commit the crime. John S. Magee has failed to establish either.

The facts in the present case demonstrate clearly that John S. Magee was someone in the business of supplying papers to students in violation of *N.J.S.A.* 2A:170-77.16. Magee's comments to the Investigators, his marketing approach and the

format of the products pointed to the inescapable conclusion that his normal operating procedure was violative of the statute. His business was, as characterized by Judge Tarleton, a "Term Paper Mill." His past history, as evidenced in *People v. Magee,* 423 *N.Y.S. 2d* 467 (S.Ct. 1979), negates any argument that he was not predisposed to violate the statute.

Petitioner was not solicited to commit the offense. He was, in fact, advertising his availability to perform these services. The Investigators' conversations with Magee merely provided petitioner with an opportunity to manifest his intention. Petitioner, in his comments to the Investigators, made it apparent that he was aware of the ostensible purpose of the sale of his material. It should be noted that in the New York case, undercover operatives were also utilized by the Attorney General's Office to establish that Magee was violating that Court's preliminary injunction. *People v. Magee, supra.*

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be **DENIED.**

Respectfully submitted,

HAROLD J. RUVOLDT, JR.
Prosecutor of Hudson County

BY: _____
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Assistant Prosecutor